IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 525 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT and

MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GSRTC

Versus

DRAUPADI NANAKRAM & 6

Appearance:

Ms. Mayaben Desai for Mr. M.D. Pandya for Petitioner

MR J.R. Nanavaty (appointed amiccus curie) for

for respondents no.1 to 6.

Respondent no.7 served.

CORAM : MR.JUSTICE Y.B.BHATT and

MR.JUSTICE A.K.TRIVEDI

Date of decision: 24/12/1999

ORAL JUDGEMENT (Per A.K. Trivedi,J.)

Heard the learned Advocate Ms. Mayaben Desai for the appellant and learned Senior Advocate Mr. J.R. Nanavaty appointed amicus curie for the respondents no.1 to 6. The respondent no.7 is served.

1. The appellant-Gujarat State Road Transport Corporation has filed the present appeal under Section 110-D of the Motor Vehicles Act, 1939(hereinafter referred to as the "Act") to challenge the judgment and award passed by the Motor Accident Claims Tribunal No.I (Main) Ahmedabad dated 5th May, 1983 in the proceedings of M.A.C. P. no.86/1982.

1.1 The respondents no.1 to 6 are the original claimants of M.A.C.P. no.86/1982 while the respondent no.7 is the driver of the offending vehicle and the appellant is the owner of the vehicle. The accident in question occurred at about 15.45 hours on 14th June, 1982 at the washing ramp of Workshop, Ahmedabad Depot of the present appellant. That deceased Nanakram Vehromal Vanjani was employed by the present appellant as a Helper in the Workshop of Ahmedabad Depot at the relevant time and was on duty on 14th June, 1982 when the said accident occurred. That according to the original claimants, the respondent no.7(driver) of the bus bearing RTO Registration no.GTE 5351 operated the bus on the washing ramp in the workshop of Ahmedabad Depot negligently and without proper precaution, as a result of which, deceased Nanakram was knocked down and sustained fatal bodily and internal injuries which subsequently resulted into his death. That after the accident, injured (deceased) was removed to Vadilal Sarabhai Hospital on the very day and he remained as indoor patient till 25th June, 1982. That the deceased succumbed to his injuries on 30th June, 1982, and thereafter, the present respondents no.1 to 6 filed M.A.C.P. no.86/1982 before the Motor Accident Claims Tribunal at Ahmedabad against the present appellant and respondent no.7 to claim compensation to the tune of Rs.2,04,086/- and other incidental reliefs.

1.2 That vide judgment and award dated 5th May, 1983, M.A.C.T. No.I (Main) Ahmedabad partly allowed the petition and held that the respondents no.1 to 6 as claimants are entitled to recover jointly and severally from the present appellant and the respondent no.7(original opponent) total sum of Rs.1,16,800/- with costs on award and interest at the rate of 6% per annum from the date of application till realisation. The present appellant (original opponent no.1) was directed

to deposit the award amount on or before 30th June, 1983 failing which interest at the rate of 15% per annum on the award amount shall be payable from 1st July, 1983. Over and above the amount of interest already ordered to be paid, the Tribunal further directed to deduct the deficit Court Fee from the amount deposited by the original opponent and awarded equal share to the claimants (the present opponents no.1 to 6). The Tribunal also ordered that the share of each of the minor claimants was to be deposited in any nationalised bank of the choice of claimant no.1 (widow) on a longterm basis of five years and in the case of the respondents no.2 to 6 (each of the minor claimants) till the period they attain maturity with a condition that swuch deposit shall not be permitted to be encashed or encumbered, in any manner, till maturity. However, the interest accruing on such deposit shall be directly payable by the bank to the opponent (the widow and original claimant no.1) as guardian of the minor claimants. That from the share of award falling due to claimant no.1(the widow) an amount of Rs.12,000/- was ordered to be deposited in a nationalised bank of her choice on a longterm basis of 5 years with usual condition against premature enchashment or encumberance. However, the interest accruing on the said amount was ordered to be paid directly to applicant no.1 by the bank and the remaining amount after making such deposit was ordered to be paid to the claimant no.1-the widow (the respondent no.1 herein) by account payee cheque.

2. That the above said award alongwith the judgment was challenged by the appellant in the present appeal.

2.1 The appellant has also filed Civil Application no.1789/1984 in the proceedings of appeal to claim stay against the execution of the award. That vide order dated 13-3-1985, the Division Bench of this Court, after hearing the parties, directed the Tribunal to invest the amount deposited by the appellant in a longterm deposit with Syndicate Bank, Nava Wadaj, Virnagar Branch, with direction that monthly interest accruing thereon be credited in a savings bank account with the said bank to be opened by the original claimant no.1 and she may withdraw the amount from the said savings bank account.

3. That on filing of note by the learned Advocate for the respondents no.1 to 6, the final hearing of the appeal was expedited and heard.

4. The learned Counsel for the appellant Ms. Mayaben Desai has urged the contention before us, to

assail the impugned judgment and award, that the learned Tribunal has erred in holding that the respondent no.7-the driver of the offending vehicle has caused the accident by rash and negligent driving without any substantial evidence placed on record by the original claimants. That legal burden to establish the negligence of the driver being on original claimant, it is obligatory on the claimants to produce necessary evidence. That, in the instant case, the original claimant no.1-the widow of the deceased has not stepped into the witness box but has examined only one witness, Dr. Vijay Thakordas Vanjani vide Exh.26 who is the Doctor who had examined the deceased and had issued certificate dated 1-7-1982 which is taken on record as Exh.27. That except said oral evidence and the documentary evidence, no other evidence is led by the original claimant so as to establish negligence of the driver(the opponent no.7) at the time of the accident. It is urged, in the alternative, that the Tribunal has failed to construe the material produced on record and has erred by holding that the deceased himself was not guilty of negligence and was therefore responsible for the accident in question. According to the appellant, the Tribunal ought to have considered the contributory negligence of the deceased and should have reduced the amount of compensation awarded vide the impugned award.

5. The learned Counsel for the appellant has taken us through the impugned judgment as well as the oral evidence (Exh.26) the deposition of Dr. Vanjani and the deposition of the opponent no.7 (Exh.13), the driver of the offending vehicle. Our attention is also drawn to the documentary evidence on record.

6. That in consideration of material produced on record in the context of submissions urged at the Bar, in our opinion, the contention raised on behalf of the appellant, as stated hereinabove, could hardly be merited acceptance for more than one reason.

7. It is well established proposition of law that there is an essential distinction between, "burden of proof" and, " onus of proof ". That the burden of proof lies upon the person who has to prove the facts asserted and it never shifts, but the onus of proof shifts from time to time, in the process of evaluation of evidence as the trial progresses. The said view is fortified by the observation by this Court made in the case of POPATLAL PARSHOTTAMDAS SHAH Vs. G.S.R.T & Anr reported in 1982 ACJ p.45.

8. In view of the above stated proposition, the claimant has to prove that the loss for which the claim of damages is made was caused by the negligent act of the defendant. However, the evidence to prove the loss and negligence may be direct or circumstantial or both. That once the claimant establishes by circumstantial evidence that defendat was negligent in doing the act which has resulted into loss, the initial burden of the claimant could be said to have been discharged and, at that stage, the onus shifts on the defendant to rebut the said evidence so as to establish that loss has not occurred on account of his act which cannot be said to be negligent.

9. In the instant case, it is not in dispute that the original claimants were not present at the place of accident, and thereby, the claimants had no personal knowledge how the accident has occurred. It is true that no eye witness to the accident has been examined on behalf of the claimant, however, such omission cannot be fatal to the claim of the claimants because the facts and circumstances apparent from the record suggests that the place where the accident has occurred and the probable persons who could be present at the place of accident were the employees of the appellant(the original opponent no.1). That the claimants have called upon the present appellant to produce the outcome of the departmental proceedings instituted against the driver of the offending vehicle (the respondent no.7). That the appellant as original opponent no.1 had produced on record the order passed against the driver of the offending vehicle in the departmental proceedings. The said order is dated 13th August, 1982 and the Tribunal has taken it on record vide Exh.36. That the order discloses the fact that the charges levelled against the driver by the present appellant in the said departmental proceedings is in respect to rash and negligent driving of the offending vehicle at the relevant time of causing the accident, That in the said departmental proceedings, the Competent Authority has imposed punishment on the driver for permanent withholding of increment for a period of three months on account of rash and negligent driving of the offending vehicle at the relevant time of said accident. That though such departmental proceedings are independent proceedings and internal administrative matter of the appellants, the decision taken in the proceedings and order passed are relevant to the proceedings of claim petition because subject matter of the said proceedings, the negligence of the driver of the offending vehicle, is the same in both the proceedings. Under the circumstances, vide order Exh.36 produced on record the claimants have established the facts that

original opponent no.2-the driver of the offending vehicle was rash and negligent in driving the offending vehicle at the relevant time and caused the fatal accident in question. On establishing the said facts, the onus has shifted on original opponents (the present appellant and opponent no.7) to rebut the said fact by leading cogent and convincing evidence. It is noteworthy that the respondent no.7-the driver of the offending vehicle as opponent no.2 of the claim petition has failed to file any written statement to controvert the averments made by the claimant, and particularly, regarding the negligence alleged against him. That the appellant(original opponent no.1) has filed written statement Exh.13 to resist the claim petition and have denied the averments made in the petition. According to said written statement (Exh.13), it is asserted that the accident in question had occurred on account of negligence on the part of the deceased himself. It is also asserted vide paragraph 14 that on the day of the accident at about 3.15 p.m., the deceased had completed his cleaning work and had gone to the site of the ramp to take rest. He went on the hind portion and sat on the side of the rear left wheel and sat there in a rash and negligent manner without being spotted. That in order to establish the said fact the present appellant as opponent no.1 of the petition has examined the respondent no.7-the driver of the offending vehicle vide Exh.30. We have carefully gone through his deposition and, in our opinion, the respondent no.7 has deposed contrary to the pleadings of the appellant. In paragraph 3 of Exh.30, the driver of the offending vehicle has stated on oath that according to instructions he has to carefully examine the bus before taking the same in his charge. That on 14-6-1982, he had obtained the log-sheet of the said bus. That the bus was placed on the ramp for cleaning. That he had examined the entire bus from inside and outside. That while examining the bus, he started from the left side of the bus and examined all the four wheels, and thereafter, coming from right side of the bus, he entered into the driver's cabin and taking charge of the steering released the handbreak after blowing the horn. That on account of slope, the bus slowly proceeded further as he had put the bus in neutral gear. That as the bus has proceeded about 1 feet he heard shouts and cries and thereby he stopped the bus and got out from the driver's cabin. That on inquiry, he found that the buttock portion of the deceased was stuck in the left rear wheel of the bus. That the persons gathered there removed the injured (deceased) and took him to V.S. Hospital. In paragraph 4, the driver has deposed that before sitting on the steering wheel, when

he examined the bus, he did not find deceased anywhere near the bus. That in the Depot there is a separate place for Helpers to take rest. He did not know how deceased had come there. That on appreciation of evidence in the context of facts apparent from the material produced on record, the version deposed by the driver cannot be accepted for the simple reason that had he examined the bus from all four sides, particularly, the left side and all the four wheels, as deposed by him, he would have found the deceased sitting there and, in our opinion, the learned Tribunal has rightly rejected the said evidence of the driver. That except the evidence of driver appellant as original opponent has not produced any other evidence and thereby, the conclusion is inevitable that the opponent no.7-the driver of the offending vehicle had moved the bus from washing ramp without examining the bus and the four wheels as per the requisite instructions and has failed to take necessary precaution before starting the bus. That thereby opponent no.7-the driver of the offending vehicle was negligent and he drove the bus rashly from the ramp which has resulted into the accident causing fatal injuries to the deceased.

10. It is also necessary to note that the averments in respect to the accident in question as apparent from the pleadings suggests that doctrine of "Res ipsa loquitur" is applicable to the facts in the case. That in the matter of PUSHPABAI PARSHOTTAM UDESHI AND OTHERS VS. M/S. RANJIT GIVVING AND ANOTHER, reported in 1977 A.C.J. p.343, the Supreme Court has observed vide paragraph 6 as under:

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiffs the true case of the accident is not know to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident " speaks of itself " or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence"

11. In the instant case, the evidence is that the

offending vehicle at the time of the accident has taken within its sweep, the buttock portion of the deceased. The driver of the offending vehicle in his deposition Exh.30 has stated that at the time of the accident, it was found that the buttock portion of the deceased was stuck to the rear left wheel of the offending vehicle. That said fact suggests the nature of accident and it would be for the original opponent to explain the circumstances in which the accident had taken place. That original opponents having failed to explain the same, the conclusion is inescapable that it had occurred on account of negligence on the part of the driver.

12. There is one more reason why the onus of proving negligence should be placed on the original opponents with regard to unfortunate accident in question. That under Section 106 of the Indian Evidence Act, 1872, a party who is in special knowledge of the fact has to establish the same. That, in the instant case, it is for the original opponents(the appellant and the respondent no.7) who are in the special knowledge of the fact of accident as the persons present at the place of the accident being employees of the present appellant are the best persons to give the account of the accident and the original opponents could have examined one or more of such person who were the eye witnesses to the accident, and as such, the original opponents having failed to lead any such evidence, the Tribunal is justified in giving a finding that driver of the offending vehicle was negligent. The Tribunal is also justified in framing the issue of negligence in two parts. The Tribunal has framed issues no.1 and 2 as under so as to facilitate the parties to lead and produce necessary evidence:

1. Do the applicants prove that the deceased husband of applicant no.1 sustained fatal injuries in an accident caused by rash and negligent driving of one bus bearing the R.T.O. registration no.GTE 5351 by opponent no.2 on 14th June, 1982 at about 3.45 P.M.?

2. Do the opponents prove that the deceased himself was guilty of negligence and was therefore responsible for the accident in question or in the alternative was guilty of contributory negligence?

13. That learned Counsel for the appellant could not reply to the question as to burden of establishing issue no.2 being on the appellant (original opponents no.1 and 2) and what evidence is led and placed on record to

establish the said fact regarding contributory negligence on the part of the deceased. That as discussed hereinabove, the only evidence produced on record by the original opponent is the oral evidence of driver of the offending vehicle which is unacceptable on appreciation, and as such, the appellant as original opponent has failed to establish necessary fact to hold that deceased was solely negligent for the said accident or was guilty of contributory negligence. The Tribunal has rightly given the findings on issues no.1 and 2 while passing the award.

14. That as regards the award of compensation, the Tribunal has awarded conventional sum of Rs.5000/under the head of loss of expectation of life and Rs.10,000/-under the head of pain, shock and suffering. The Tribunal has awarded Rs.1000/- towards medical expenses and incidental charges while has awarded Rs.1,00,800/- under the head of loss of dependency benefit calculated on the basis of monthly income of the deceased at Rs.880/- from which deducting Rs.180/towards personal expenses and taking the datum figure at Rs.700/-per month and the age of the deceased at 44 years, has applied the multiplier of 14. That as such, the Tribunal has reduced the claim of Rs.2,04,286/- and has awarded only Rs.1,16,800/-. In our opinion, it is a just, proper and reasonable amount in the facts of the case.

14. As no other contention is raised, in our opinion, the judgment and award rendered by the Tribunal cannot be said to be unjust, improper or unreasonable and we find it difficult to hold that any interference of appellate authority is warranted.

15. On the basis of the aforesaid discussion, the appeal fails and stands disposed of as rejected with costs. That the interim relief of stay of the execution of award granted vide order dated 13-3-1985 passed in Civil Application no.1789/1984 stands vacated.

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